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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 72-1733

CHRISTOPHER JOSEPH MUSSER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

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The decision of this court, reached without the benefit of briefs on the merits or oral argument, holding that draft boards are without power to re-open or rule upon the merits of post-in-

duction notice claims of conscientious objection and that the Army under Army Regulation 635-20, 3.b.(2) can neither refuse to give a full and fair hearing to such a claim or reject it on the grounds that the Selective Service System has considered the merits of the claim is welcomed because it clarifies an area of the law that has long been a source of confusion and uncertainty for registrants, legal advisers, the Selective Service System and draft experts. The decision is now a source of certain notice to all that post-induction notice claims of conscientious objection are not to be and cannot be considered by local draft boards and that any consideration given to such a claim by a local draft board is, for all purposes,

to be ignored. The decision is also a warning to the Army that a distinction must now be drawn between those conscientious objector claims maturing prior to issuance of an induction notice and those maturing after the issuance of an induction notice and that, insofar as the post-induction notice claims are concerned, the Army must give full consideration under established criteria to all such claims.

However, petitioner respectfully requests that this court reconsider its Per Curiam decision, at least insofar as it pertains to registrants who refused induction prior to the rendition of Ehlert v. United States, 402 U.S. 99 (1971) on April 21, 1971, for in adjudicating this case solely on the basis of petitions for certiorari and a responding memoran-

dum, the court has had to assume the existence of an Army practice which has never been forced to withstand the vigors of the judicial fact finding process and which newly compiled and painstakingly researched evidence conclusively shows did not exist. The court's Per Curiam opinion was based on Ehlert, supra, which, in turn, relied primarily upon a letter prepared especially for the court's use and only submitted following oral argument in that case. That letter, from then General Counsel of the Army Jordan to then Assistant Attorney General Rehnquist, stated:

> "You asked whether the Army allows a soldier to file for discharge in instances where his conscientious objector views are fixed after notice of induction

"but prior to entry into the military service. Present practice grants the soldier the opportunity to file in such cases."[1]

As the court said in Ehlert:

"We are assured . . . that there thus exists no possibility that late crystallizers will find themselves without a forum in which to press their claims . . . for if, contrary to that assurance, a situation should arise in which neither the local board nor the military had made available a full opportunity to present a prima facie conscientious objection claim for determination under established criteria . . .

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1 Letter reprinted in relevant part in Ehlert, supra, 107, Note 11.

"a wholly different case would be presented." (107)

Despite the court's own language that there must be "no possibility" of registrants finding themselves without a forum, to the best knowledge of counsel, there has never been any judicial proceeding where competent evidence was presented by parties on both sides of the issue and where a judicial determination had been made as to the existence of such a practice. By ruling without the benefit of full briefs and oral argument, the court has precluded petitioner from presenting and itself from considering documented and detailed evidence that not only was there a "possibility" that late crystallizers would be without a forum but that Army practice was directly contrary to the assurance upon which

Ehlert was predicated. At all times prior to Ehlert, the Army has failed to distinguish between those whose conscientious objector claims crystallized after issuance of an induction notice and those whose claims crystallized prior to the issuance of such a notice and the Army practice has been to reject all claims to conscientious objector status maturing prior to entry into active service.

Counsel is aware of three official responses from the Army as to its practice in regard to the treatment of in-service conscientious objector claims which allegedly matured prior to entry into active service but subsequent to the issuance of the order to report for

induction.[2]

In view of the court's language in Ehlert re "no possibility" of a forumless registrant, the equivocating language used by General Counsel Berry in the letter submitted to the court in United States v. Shomock, 462 F.2d 339 (3rd Cir. 1972) saying:

> "If it is assumed that Army policy would have been followed in appellant's case . . . ." (345, Fn.17)

is most surprising; however, it is not as surprising as the fact that not one of

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2 In addition to the letter quoted in Ehlert, a similar letter was submitted to the court in United States v. Shomock, supra, and quoted in full in Fn. 17 therein. In addition, a letter was sent to Senator Gaylord Nelson on February 16, 1972 by Major General Bernard W. Rogers, Chief of the Department of the Army, Legislative Liaison.

those three responses makes reference to any actual case where what was originally referred to as "Army practice" and later referred to as "Army policy" was actually followed. Because the dispute as to the existence of such a "policy" or "practice" could most easily be put to rest by reference to actual cases where registrants had been treated in accordance with the alleged "policy" or "practice" this omission raises a strong suspicion that while perhaps such a "policy" may exist in the eyes of the Army's legal counsel, no actual "practice" exists whereby registrants are given treatment in accordance with this policy. While the existence of such strong suspicions may not, in the eyes of this court, be sufficient reason to give its valuable time to a review of detailed briefs on the merits

or the consideration of oral argument, the fact that documented evidence shows that there was no such practice and that there are no such actual cases is sufficient reason for plenary consideration by this court.

Petitioner cannot, in this request for a rehearing, present to the court all of the evidence contradicting the Army's assurance of a forum as the detailed and fully documented exposition which this issue requires can only be brought to the court's attention through a brief on the merits. This is particularly true in this situation as some cases are not reported and others must be supplemented by material not appearing in reported decisions. A bare outline of the evidence that has been marshalled must suffice.

Apart from Army Regulation 635-20 and Department of Defense Directive 1300.6, the only information available to Army personnel prior to this court's decision in Ehlert, was a manual elaborating upon the regulatory provisions prepared for the use of Army chaplains counseling conscientous objector claimants. This material did not and still does not contain any mention of the "policy" referred to in the letter submitted in Ehlert. Furthermore, all references therein to the time of crystallization required for favorable treatment for in-service claims state that such claims must mature after the date of induction and there is no reference to the fact that those claims maturing subsequent to the issuance of an order to report for induction are to be treat-

ed differently from those maturing prior to the issuance of an induction notice.

In addition, inquiry was made of several attorneys now in private practice who were formerly in the Judge Advocate General Corps and served on the Army's Conscientious Objector Review Board. One individual responded in part:

> "I do not recall observing a policy on the part of the hearing officers to employ a practice of granting CO status to persons whose views crystallized prior to induction."[3]

A second responded that while he could not be certain that the interpretation placed upon the regulations in the let-

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3 Letter to Bella A. Silard dated May 25, 1973 from Forest T. Walpole.

ter submitted to the court in Ehlert had never been communicated to members of the Board, he did state that:

> "So far as I can recall, however, I have never seen any such interpretation." [4]

A third response stated:

> "I do not recall ever having been made aware of the practice outlined by Mr. Jordan during the time I served on the Conscientious Objector Review Board. . . .
>
> "At this particular time, reflecting back to late 1970 and early 1971, I don't believe we followed a practice of allowing conscientious objector status to anyone whose conscientious objective

4 Letter to Bella A. Silard dated March 26, 1973 from Daniel H. Skerrit.

"views crystallized prior to his actual entry on active duty."[5]

Thus, three lawyers, all former members of the Army body charged with the implementation of the applicable rules and regulations have stated that they cannot recall being made aware of the practice which General Counsel Jordan assured the court did exist and two of the three members do not believe that individuals whose conscientious objector claims crystallized prior to entry into active service were granted conscientious objector status.

The actual practice of the Army, at least prior to Ehlert and for some time thereafter, was to treat all conscien-

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5 Letter to Bella A. Silard dated May 3, 1973 to Sheldon G. Gilman.

tious objector claims, whether maturing before or after the issuance of a notice to report for induction, the same and to deny all such claims on the ground that they arose prior to entry into active service. While this standard finding tends to obscure the issue because it makes no distinction as to whether a claim matured before or after the issuance of an order to report for induction, the cases of Guy James Morrison, Earl F. Haase and John Michael Ryan show that included within this group of cases are cases where the Army has denied a forum to individuals whose claims have matured subsequent to the issuance of an order to report for induction.

In Morrison v. Larsen, 70 858 ACW (N.D. Cal. 1970) rev'd and remanded, 4 SSLR 3335, 446 F.2d 250 (9th Cir.

1970), order on remand, No. 70 858 ACW (N.D. Cal. 1972), the record discloses that while the registrant filed a statement of his "political and moral attitudes" prior to the issuance of an induction notice, the board did not treat this as a claim for conscientious objector status and did not evaluate the claim. Subsequent to the issuance of an induction notice the registrant completed a Form 150 which the local board considered and denied on the ground that he "stated that his feelings toward war had not changed." After induction into the Army, Morrison's claim for conscientious objector status was denied and habeas proceedings followed. Although the Ninth Circuit subsequently determined that Morrison's case was a "late filing" as opposed to a "late crystallizing"

situation, the important point is that the Army, in denying relief under Army Regulation 635-20, did not deny relief on the ground ultimately cited by the Ninth Circuit; rather, the Army's decision was based upon the fact that a claim had been presented to and denied by the Selective Service System. Since the record clearly shows that the only time a claim had been presented to and denied by the local board was subsequent to the issuance of a notice to report for induction, this is a blatant case of the Army denying a forum because of actions taken by a draft board in considering a registrant's claim on the merits subsequent to the issuance of an order to report for induction. These facts then were identical to those of the situation facing petitioner Musser at the time of

his refusal to submit to induction.

In the case of Haase, an application for conscientious objector status claiming crystallization after receipt of the induction notice was filed with the registrant's draft board subsequent to the issuance of a notice to report for induction. On his application for in-service relief, the hearing officer specifically found that the application was not based upon conscientious objection which existed but was not claimed prior to notice of induction and recommended that the claim be granted. However, the Conscientious Objector Review Board simply ignored the fact that this was a claim crystallizing subsequent to the issuance of an induction notice and denied the claim on the ground that the registrant's beliefs "existed prior to

his entrance on active duty." While this finding is not inaccurate because the claim did crystallize prior to entry into active service, it demonstrates a case where the Army placed a registrant in the "no man's land" referred to in Ehlert as registrant Haase was denied any forum wherein his claim could receive proper evaluation.

The case of registrant Ryan is even more flagrant as it suggests knowledge on the part of higher Army officials of the fact that the Army was, in practice, completely denying a forum to post-induction notice conscientious objector claimants. Ryan filed a conscientous objector claim with his local draft board claiming crystallization subsequent to the issuance of that notice. The claim was not considered by the local board and Ryan

submitted to induction only after a pre-induction suit in which the Court of Appeals for the Eighth Circuit ruled that Ryan would have the opportunity to present his claim to the Army subsequent to his induction notice.[6] Subsequent to induction, Ryan filed his claim for conscientious objector status to which was attached a statement from his attorney quoting both Army Regulation 635-20 and the opinion rendered by the Eighth Circuit. In spite of this clear warning, the Conscientious Objector Review Board denied the application on the sole ground that the registrant's beliefs "are based upon conscientious objection which existed prior to entry into the military service." One day later, Ryan

6 Ryan v. Hershey, 3 SSLR 3929. 308 (E.D. Mo. 1969) aff'd. 4 SSLR 3197. 445 F.2d 560 (8th Cir. 1971). cert.denied. 404 U.S. 1004 (1971)

made application for a writ of habeas corpus. The matter never proceeded further, however, as four days after that Ryan received a telegram from the Secretary of the Army granting him an honorable discharge. While no reason was given for the honorable discharge, the only reasonable conclusion which might be drawn was that high Army officials, aware of Ehlert, sought to avoid the embarrassment and publicity which a decision on the merits by the trial court would cause. This then is another case where Army personnel showed a lack of awareness of its own regulations and the Ehlert case and denied a forum to a post-induction notice conscientious objector claim by making its standard, vague finding of crystallization prior to entry into the military service.

As further evidence of the Army's lack of awareness, petitioner would point, in addition to the cases referred to above, to the many cases where in-service relief was denied with the standard finding that the claim crystallized prior to induction. If the Army were truly aware of the distinction that its own regulations and Ehlert require be drawn between pre-induction notice and post-induction notice conscientious objector claims, they would have instructed members of the Conscientious Objector Review Board that such findings are inadequate to sustain classification decisions when those decisions are attacked in subsequent habeas corpus proceedings. See Applegate v. Stillwell, C-73 1120 ACW (N.D. Cal. July 26, 1973). Such findings are inadequate for the pur-

pose of sustaining such decisions because they would be equally applicable to a post-induction notice crystallization case where denial upon that ground would, under Army Regulation 635-20 and Ehlert, be improper and to pre-notice crystallization cases where denial would be proper.

As an additional ground for this request for a rehearing, petitioner submits that this ruling should not be given retroactive application, at least insofar as it concerns those who were convicted for refusing induction prior to the rendering of the Ehlert decision. It was only with the rendering of that decision, some three months after petitioner's refusal to submit to induction, that the public was put on notice of what the Army claimed to be its policy. Prior to that time, a registrant whose

draft board had expressly ruled on the merits would, in considering how the Army might evaluate an in-service claim, have to contend with Army Regulation 635-20, 3.b.(2) which stated that such claims would not be favorably considered when "based solely on conscientious objection claimed and denied by the Selective Service System prior to induction." (emphasis added) As late as 1972, the Army in the letter submitted to the court in United States v. Shomock, supra, setting forth its policy with regard to post-induction notice claimants, stated:

> "If the appellant had entered the Army in May 1969 under circumstances where the Selective Service System actually considered and denied his conscientious objector claim on the merits, he

"would not have been entitled to an in-service determination on the merits of his conscientious objector claim." (345, Fn. 17)

It was only with the rendition of Ehlert, that anyone could reasonably believe that a denial on the merits under circumstances such as those in the case of petitioner would not preclude in-service relief because a local board was acting beyond its authority in considering the merits of such a claim. That persons could not reasonably have been expected to anticipate such a result prior to Ehlert is recognized by this court in its Per Curiam opinion where it states:

"While the critical word 'denied' might arguably be applied to a board's refusal to reopen a classification, it cannot

"be so applied to a refusal to reopen a classification based on a claim of conscientious objection crystallizing after issuance of a notice to report, now that Ehlert has made clear that such a refusal can only be based on the board's lack of power to reopen in such a posture." (Per Curiam Opinion, page 8) (emphasis added)

It is submitted that prior to Ehlert, the Army regulations and practice were so unclear as to fail to give registrants notice of the fact that post-induction notice claims to conscientious objector status would be given full and fair consideration on the merits when raised in the Army after induction. To uphold convictions of those, such as petitioner, who read Army Regulation 635-20, 3.b.(2)

as denying them the right to in-service relief is to impose a most cruel penalty upon those who, without the benefit of relevant case law, made an interpretation identical to that made two years later by the First and Third Circuits.

This petition has demonstrated that there is significant and substantial evidence which compels the conclusion that the Army's assurances that there was a forum available to post-induction notice claimants for conscientious objector status was false and that courts have been misled by this assurance. In addition, the gross unfairness to those who, prior to Ehlert, reasonably interpreted the regulations as denying them any forum in which they could raise their claims to conscientious objector status has been demonstrated. For these rea-

sons, we respectfully request that this court grant this petition for a rehearing and set this matter for briefing and oral argument.

Respectfully submitted,

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CERTIFICATE OF GOOD FAITH

We, the undersigned, being counsel in this matter, do hereby certify that this Petition for Rehearing is presented and filed in good faith and not for the purpose of delay.

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S/Ronald A. Rubenstein
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